



132

Inspections and Searches in the Environmental Context

D
L94.7
I57
L987
10E



Environment
Ontario

INTRODUCTION:

This handbook was produced to assist provincial officers regarding your rights, limitations, and obligations when entering private property. It is meant to be a quick reference guide to the law, as it was in the summer of 1987, and how it may be interpreted.

If you have any questions, please contact the Legal Services Branch. We will be happy to assist you.

Dianne Saxe
Counsel

TD Inspections and searches in the
194.7 environmental context.
.I57 82850
1987

OVERVIEW

- The importance of environmental protection is now recognized by the public, and by all levels of courts

Reference re s.94 of the Motor Vehicle Act,
(1985) 24 D.L.R. (4th) 536 at 561-2 (S.C.C.)

R. v. Sheridan, (1973) 2 O.R. 192 at 207

- Legislature has created broad regulatory scheme
- Importance emphasized by newly enhanced penalties
- Success of regulatory scheme depends on enforcement.

ADMINISTRATIVE INSPECTIONS IN THE ENVIRONMENTAL CONTEXT – GENERAL

■ Statutory authority

- Environmental Protection Act*, s.127, 128, 129
- Ontario Water Resources Act*, s.10
- Pesticides Act*, s.17
- Fisheries Act*, s.35, 35.1
- Pest Control Product Act*, s.7, 8, 9
- Atomic Energy Control Regulations*, s.12(d)

■ Who can inspect

- provincial officers, appointed by Minister to carry out duties under particular statute
 - provincial officers are peace officers for the purpose of the statutes which they are appointed to enforce, but are not police officers
R. v. Renz (1972), 10 C.C.C. (2d) 250 (Ont. C.A.)
 - when acting in the course of their duties, they are protected by the Criminal Code s. 118 (assault peace officer) and 119 (personate peace officer)
 - they are not entitled to use force
 - they are not armed, and are rarely uniformed
 - some officers are designated only for a particular part of the statute
- must carry his/her official designation
- must produce it at first reasonable opportunity,
 - this is unlikely to be strictly enforced where the officer is clearly already known to the person inspected (e.g. called by name)
- can bring reasonable assistance, e.g. police officer
Environmental Protection Act, s.128

■ Purpose of administrative inspections

- to locate and identify pollution
- to check for compliance with
 - statutes
 - regulations
 - certificates of approval
 - orders
 - licences
 - etc.
- to identify, contain, clean up, and prevent future repetitions of incidents such as emissions or spills
- to examine opportunities to reduce pollution
- to discuss and attempt to resolve neighborhood complaints about pollution
- to determine whether proposed construction or alterations should be approved
- to ensure that pollution control equipment has been constructed as applied for and approved

■ What can be inspected

- premises or businesses which are subject to or require a certificate of approval, order, licence, etc.
Regina v. Quesnel, (1985) 53 O.R. (2d) 338; 24 C.C.C. (3d) 78 (Ont. C.A.) leave to appeal refused (S.C.C.)
Ozubko v. Manitoba Horse Racing Commission, Man. C.A. October 24, 1986
 - least expectation of privacy
- premises which adversely affect the public welfare, e.g. from which a contaminant is discharged
Re Yorkville North Development Ltd. and City of North York, (1986) 57 O.R. (2d) 172
Bertram Miller, 28 C.C.C. (3d) 263 Fed.C.A.
- other premises where regulated activities take place
Belgoma Transportation Ltd. and Director of Employment Standards, (1985) 20 D.L.R. (4th) 156; 51 O.R. (2d) 509 (Ont. C.A.)
R. v. Meredith, (unreported endorsement) Ont. C.A., June 17, 1985
- dwellings
 - greatest expectation of privacy
 - refers to room(s) actually used by someone as a home; does not include uninhabited buildings
 - officer must be especially scrupulous to produce designation before entry
 - occupant can request officer to return at a more convenient time

Regina v. Bichel, (1986) 4 B.C.L.R. (2d) 132 (B.C.C.A.)

- officers must not enter without consent except in dire emergency (imminent danger of harm not compensable in money), or under the authority of a judicial order or warrant
R. v. Sheppard, 11 C.C.C. (3d) 276 (Nfld. C.A.)
- refusal to grant access upon request will rarely constitute obstruction

open places

- low expectation of privacy
U.S. v. Dunn, 55 L.W. 4251 (1987; U.S.)
- in many cases, officers need not resort to statutory powers to enter

vehicles and vessels

- vehicles and vessels are places or things which may be inspected
R. v. Meredith, (unreported endorsement) Ont. C.A., June 17, 1985
South Dakota v. Opperheim, (1976) 428 U.S. 364
- however, the Charter prohibition against arbitrary detention of persons presents special considerations in inspecting vehicles or vessels which are moving
- moving vehicles or vessels may not be stopped for inspection on a random or arbitrary basis at the discretion of the officer. However, organized roadblocks, (e.g. at a lock or landfill site), where individual discretion is limited, are permissible
R. v. Ladouceur, Ontario C.A., April 8, 1987
- moving vehicles or vessels may be stopped for inspection if the officer has an 'articulable cause' related to the purpose of the statute for selecting that particular vehicle or vessel
R. v. Ladouceur, Ontario C.A., April 8, 1987

■ When

- any reasonable time
- normally during usual business hours
- can be late at night for businesses which normally operate at that hour
- extensive inspections or audits, usually called 'surveys', may last for several weeks

■ What can the officer do during the inspection

- all activities must be reasonably related to the purpose of the entry, and to the governing statute
- officer must consider the activity necessary for the administration of the Act and regulations

- officer may observe and inquire into anything which may affect the discharge of contaminants from the premises, such as:
 - direct emissions
 - leaks
 - storage facilities
 - waste handling facilities
 - production processes which generate wastes or emissions
 - precautions for dealing with upsets, spills and adverse weather
 - employee training
- (note broad definition of contaminant)
- occasionally may make minor excavations, e.g. to examine septic tanks; in this case, officer should be expected to restore the excavation to the extent reasonable in the circumstances
- officer may also observe and inquire into procedures for compliance with regulatory requirements, e.g. waste manifests
- officer may audit relevant books and records
- officer may obtain relevant information from any employee
 - it is an offence to penalize, coerce or intimidate any employee because the employee has given or may give information to the Ministry or a provincial officer
Environmental Protection Act, s. 134b
 - the Ontario Labour Relations Board also has jurisdiction to inquire into and remedy such a situation
Environmental Protection Act, s.134b
- officer may record information by making notes, photos, audio or videotapes, etc.
- officer may take reasonable samples
- officer can make extracts or copies of any relevant document
- person inspected is entitled to know reason for inspection
- investigation seeking evidence of a past offence for the purpose of prosecution is not an inspection, but a search, and is governed by the normal rules for searches set out in *Hunter et al. v. Southam*, (1984) 2 S.C.R. 145, 11 D.L.R. 4th 141

■ What can the officer require the person inspected to do during the inspection

- anything reasonably ancillary to the inspection
- usually will be restricted to assisting the officer, by providing information, demonstrating and explaining the operation of machinery, providing access to something which requires inspection, etc.
- officers cannot make control or stop orders requiring the person to cease pollution; these are the perogative of the Director. However, failure to control avoidable emissions pointed out by the officer will adversely affect any future due diligence defence.

■ Production of documents

- officer can require the person inspected to produce for his/her inspection any documents reasonably related to the purpose of the entry, such as:
 - documents required to be kept by the Act or regulations, e.g. waste manifests, records of pesticide sales, etc.
 - waste disposal records
 - operations and emission logs
 - work orders
 - plans and drawings
 - books of account
 - related correspondence and files
 - company policies on environmental protection
 - training materials

Belgoma Transportation Ltd. and Director of Employment Standards, (1985) 20 D.L.R. (4th) 156; 51 O.R. (2d) 509 (Ont. C.A.)

Charboneau et al. v. College of Physicians and Surgeons, (1985) 52 O.R. (2d) 552

Re Cole and F.W. Woolworth Co. Ltd. et al., (1985) 22 D.L.R. (4th) 609 (Sask Q.B.)

Re Eagle Disposal and Min. of Env., 9 C.C.C. (3d) 500, aff (1984) 13 C.C.C. (3d) 351 (Ont. C.A.)

Re Gershman Produce Co. Ltd. and Motor Transport Board, (1985) 22 D.L.R. (4th) 520 (Man. C.A.)

Thomson Newspapers Ltd et al. v. Director of Investigation & Research et al., (1986) 57 O.R. (2d) 257 (C.A.)

- Officer can require copies of such documents to be made for his/her use. Frequently, the officer will request the person inspected to initial the copies, verifying their accuracy and completeness

■ What can the officer take away

- reasonable samples
- copies of any relevant document (originals only with consent)
- anything, other than a document, which requires further tests which cannot be performed at the scene
 - this is an extraordinary power which cannot be exercised without good reason and in good faith. It cannot be used as a back door stop order
 - the person inspected is entitled to be told the reason for this action, and the tests which are necessary
 - a receipt should be given for the thing
 - the tests should be performed as soon as possible and the

thing promptly returned.

- things which afford evidence of the commission of an offence

- things in plain view

Re R. and Shea, (1982) 38 O.R. (2d) 582 (H.C.)

R. v. Longtin, (1983) 41 O.R. (2d) 545 (Ont. C.A.)

R. v. Russ, B.C. Co. Ct., Prince Rupert, McKinnon Co. Ct. J. March 3, 1987

Chic Fashions (West Wales) Ltd. v. Jones, (1968) 2 Q.B. 299

Coolidge v. New Hampshire, 403 U.S. 443 (1971)

Steagald v. U.S., 451 U.S. 204 (1981)

Ozubko v. Manitoba Horse Racing Commission, unreported, Man. C.A. October 24, 1986

- things which come to the officer's attention in the course of the inspection or audit, and which may be lost or destroyed in the time needed to get a warrant

New Garden Restaurant and Tavern Ltd. et al. and

Minister of National Revenue, (1983) 43 O.R. (2d) 417 (H.C.J.)

c.f. *R. v. Dzagic*, (1985) 19 C.C.C. (3d) 98 at 104, aff. other grounds 27 C.C.C. (3d) 1 (Ont. C.A.)

c.f. *R. v. O'Flaherty*, March 27, 1987, (Nfld. C.A.)

- the courts will be careful to ensure that this power is not used in bad faith to evade warrant requirements

■ Detention at the scene

- the officer may detain a thing which requires further examination where he finds it. This may include a vehicle on a public road.
- only things can be detained, not people.
- the officer should specify in writing exactly what is detained, where, under what conditions, and for how long
- the person inspected is entitled to know which tests are required, and the reason for them
- the tests must be performed and completed promptly

■ Inspection of vehicles' mechanical condition

- MOE operates a special test centre in Downsview to check the tailpipe emissions of motor vehicles. Cars which appear to police to have excessive emissions will be given a ticket requiring them to come to the Centre within the next few weeks. If excess emissions are found, they will be given another few weeks to bring the vehicle into compliance.
- abandoned vehicles may be removed to abandoned motor vehicle disposal sites such as wreckers' yards

■ Self-incrimination

- the privilege against self-incrimination gives a person charged

with an offence the right not to be compelled to be a witness for the prosecution at his or her trial. It does not apply to persons who may later be charged with an offence, whether or not an investigation is already underway

Thomson Newspapers Ltd. v. Director of Investigation,
Ont. C.A. Oct. 22, 1986

R. v. Esposito, (1985) 53 O.R. (2d) 356 (Ont. C.A.)

- only a person charged with an offence can claim the privilege. A corporation or other employer cannot prevent its employees (including directing minds) from being compelled to give evidence against it

Re Corning Glass Works of Canada Ltd. (1971) 2 O.R. 3 (C.A.), leave to appeal to S.C.C. refused (1971) 2 O.R. 11n

Re Arrigo and the Queen (1986), 29 C.C.C. (3d) 77 (Ont. H.C.)

- every one is required to furnish such information as a provincial officer requires for the purpose of the Act and regulations

Environmental Protection Act s.127(3), 129

R. v. Vandervoet, (1986), 15 W.C.B. 491

- if the officer has reasonable and probable grounds to believe that a particular individual has committed an offence, any statement given by that individual will be subject to the usual 'confessions rule': i.e. the statement will only be admissible in court against that person if it was made voluntarily. Generally, this requires the giving of a caution, and the absence of promises or threats

- statutory compulsion does not take away the 'voluntary' character of a statement

Walker v. the King, (1939) S.C.R. 123, 214

- except in emergencies, persons inspected are free to consult their counsel before providing information to a provincial officer
- as provincial officers have no right to arrest or detain anyone, they have no occasion to advise people of their right to counsel under s. 10 of the Charter.

WARRANTS ARE NOT REQUIRED FOR ADMINISTRATIVE INSPECTIONS

■ Administrative context v. criminal context

- purpose of inspections is to avoid or remedy risks to the public welfare generally caused by ignorance, negligence or cost-cutting, not by deliberate criminal acts
- purpose is primarily preventative and protective

Malarctic Hygrade Gold Mines (Canada) Ltd. & Ontario Securities Comm., (1986) 54 O.R. (2d) 544 (Div. Ct.)

- routine inspections, including spot checks, are necessary and proper means of ensuring compliance with regulatory scheme
Ozubko v. Manitoba Horse Racing Commission, unreported, Man. C.A. October 24, 1986
R. v. Bichel, (1986) 29 C.C.C. (3d) 438 (B.C.C.A.)
- warrant systems, requiring proof of a pre-existing offence, cannot be used effectively to prevent future problems, which is the principal goal of a regulatory system
- no inherently suspect group is targeted
R. v. Sydholm, (1983) 22 MV.R. 37 (B.C.C.A.)
- no stigma is involved in administrative inspection
- it is undesirable to delay inspections until after problems have been demonstrated (remember the Titanic)
- economic and political power of regulated industry limits potential for abuse
- when problems, e.g. spills, do occur, response must be immediate
- good historical record: almost no known abuses

Ontario Law Reform Commission report, *Rights of Entry*

■ An inspection is not a search

- intrusiveness of inspections is limited
- no rummaging through personal possessions
- performed without the use of force

Provincial Offences Act, s.130

- inspectors are unarmed and generally not uniformed
- if officers overstep proper boundaries, they may be asked to leave

■ Warrantless inspections are not unreasonable in an administrative context

- regulated businesses cannot reasonably expect privacy from inspection by regulatory agencies:

R. v. Rao, (1984) 46 O.R. (2d) 80, 90 D.L.R. (4th) 542, 12 C.C.C. (3d) 97 (Ont. C.A.)

Re Belgoma Transportation and Dir. of Employment Standards, (1985) 20 D.L.R. (4th) 156; 51 O.R. (2d) 509 (Ont. C.A.)

Ozubko v. Manitoba Horse Racing Commission, unreported, Man. C.A., October 24, 1986

Donovan v. Dewey, 452 U.S. 594 (1980)

- application for a licence, certificate of approval, etc. is evidence of tacit consent to the reasonable enforcement of the terms of the licence, etc. including compliance with the relevant statute and regulations

Ozubko v. Manitoba Horse Racing Commission, unreported, Man. C.A., October 24, 1986

Tallman v. Dept. of Natural Resources, 365 N.W. (2d) 724 (Mich. 1984)

ADMINISTRATIVE INSPECTIONS UNDER JUDICIAL AUTHORITY

■ Statutory authority

- Environmental Protection Act*, s.127(2)
- Pesticides Act*, s. 17 (3)

■ The form of the order

- Form 147, *Provincial Courts Act*
- should be reasonably specific about what the officer is entitled to do
- must name one or more specific officer(s)
 - others may assist:
Environmental Protection Act, s. 128
- should specify an expiry date
- must be carried out between sunrise and sunset, unless specified otherwise

■ The application for the order

- must be sworn
 - Provincial Offences Act*, s. 145
- must follow Form 142, *Provincial Courts Act*
- must attest, on reasonable and probable grounds, to facts which would justify the order sought
 - Provincial Offences Act*, s. 145
- confidential informants need not, and generally should not, be named

■ Grounds for the order

- the actions to be authorized by the order must be necessary for the administration of the Act
- enforcement of the Act and regulations is included in 'administration of the Act'
 - Re Eagle Disposal and Min. of Env.*, 9 C.C.C. (3d) 500, aff (1984) 13 C.C.C. (3d) 351 (Ont. C.A.)
- generally, the order will be sought in a situation of ongoing or recurring pollution
- it is not necessary to allege the commission of an offence
- common examples:

- entries necessary to obtain documents required to determine the ownership of a contaminant for the purpose of an administrative order such as a control order
Re Eagle Disposal and Min. of Env., 9 C.C.C. (3d) 500, aff (1984) 13 C.C.C. (3d) 351 (Ont. C.A.)
- brief entries required for abatement purposes on a large number of properties, e.g. to take samples, or to locate sources or path of travel of a recurring or ongoing contaminant
- businesses which have refused to permit a routine inspection

courts can be expected to be vigilant to prevent use of this provision to evade warrant requirements

■ Effect of the order

- the order can authorize the named officer to do anything set out in section 2, Administrative Inspections in the Environmental Context.
- the order can authorize numerous activities not possible under a search warrant, such as excavations for the purpose of inspection, dye tests, prolonged sampling, detention of a thing in place, etc., and can have legal effect for more than 15 days
- an officer can require a police officer to assist him/her in executing the order. The police officer can use reasonable force for the purpose.
- a homeowner does not have the right to refuse entry to an officer acting under an order.

■ Inspection of the order

- the person inspected has the right to examine the order before granting the officer entry
- the person is not entitled to examine the supporting sworn statement at that time
- the person inspected is not entitled to a copy of the order, but may be provided one as a courtesy
- after execution of the order has been completed, the person inspected is entitled to a copy of the order and of the supporting statement. These may be obtained from the court or from the MOE legal branch

A.G. of Nova Scotia et al. v. MacIntyre (1982), 65 C.C.C. (2d) 129 (S.C.C.)

in exceptional cases, the Crown may apply to the court for an order protecting from disclosure some portions of the supporting statement (e.g. the name of a confidential informant). However, such information may have to be disclosed at trial

if necessary to permit the defendant to make full answer and defence

■ **Review of the order**

- application to High Court comparable to prerogative writ
Provincial Offences Act, s. 124
- appealable to Court of Appeal
- review usually takes place after execution of the order

RELEASE OF THINGS REMOVED OR DETAINED DURING AN INSPECTION

■ **Release of anything removed or detained may be sought by application to a justice of the peace upon notice to MOE**
Environmental Protection Act s. 127 (1b)

■ **The thing will be released where its detention is no longer necessary for the purpose of the administration of the act and regulations**

ADMINISTRATIVE ENTRIES UNDER E.P.A. PART IX (SPILLS)

■ **Only applies when a spill has occurred and in the course of responding to that spill**

Environmental Protection Act s. 83

■ **Entry may be performed by anyone subject to a duty, order or direction under Part IX, *Environmental Protection Act (Spills Bill)***

■ **Includes**

- Ministry employees or agents subject to a direction (s. 82)
- owner of pollutant and person having control of it (s. 81)
- municipal employees (s. 88) person named in an order (s. 85)

■ **Can enter any building, structure, vehicle, land, water or air of any person**

■ **Can remove the pollutant or anything affected or that may reasonably be affected by the pollutant**

■ **Right of entry enforceable by application without notice to a judge or local judge of the Supreme Court**

Environmental Protection Act s. 83(2)

■ **Specific powers under Part IX are in addition to, not instead of, normal inspection powers of provincial officers. Thus, a provincial officer following upstream the path of an ongoing spill may enter (but not break into) private property other than dwellings.**

SEARCHES INTENDED ONLY TO OBTAIN EVIDENCE FOR THE PURPOSE OF PROSECUTION – SEARCH WARRANTS

- Generally, search and seizure (as opposed to inspection) is permissible only under the authority of a warrant or with the consent of the person searched

Hunter et al. v. Southam, (1984) 2 S.C.R. 145, 11 D.L.R. (4th) 141, 14 C.C.C. (3d) 97

- Statutory authority

Provincial Offences Act s. 142

Criminal Code, s. 443, for federal offences, e.g.

Fisheries Act

- Minimum requirements for a valid search warrant:

- issued and signed by a justice of the peace or judge
- based upon a signed and sworn information which sets out in reasonable detail:
 - the offence believed to have been committed
 - reasonable grounds for that belief
 - the things which are to be searched for (can describe classes of things, e.g. all correspondence and files during a specified period that relate to a specified offence; some discretion is inevitable in complex cases, but the warrant must not include vague basket clauses; can include samples)
- R. v. Church of Scientology of Toronto*, Ont. C.A., January 30, 1987, unreported
- that the things are believed to be either the subject of the offence, or evidence of the offence
- reasonable grounds for that belief
- the place to be searched (need not belong to the offender, but if it belongs to a third party, the grounds will be more closely scrutinized. Special considerations apply to searches of law offices)

R. v. Church of Scientology of Toronto, Ont. C.A., January 30, 1987, unreported

Re United Distilleries Ltd. (1946), 88 C.C.C. 338 (B.C.S.C.)

- that the things are in the place to be searched
- reasonable grounds for that belief
- issued to a police officer or named person(s)
 - in environmental context, usually one or more provincial officers
 - all provincial officers performing the search should be

- named, as they are not police officers
- police officers need not be named

specifying

- the alleged offence
- the place to be searched,
- the things to be searched for
- its expiry date

■ Minimum requirements for a valid search:

see *Wah Kie v. Cuddy* (1914), 23 C.C.C. 383 (Alt. C.A.)

- it must comply with the warrant
- it must be performed reasonably, without unnecessary intrusiveness or force
 - generally, if force is required, a provincial officer will call upon a police officer for assistance
- particularly at a dwelling, the officer should knock, identify himself/herself, and explain the reason s/he is there
- the warrant must be shown on request to the person searched
Provincial Offences Act, s. 132
- the search must be performed by the person(s) to whom the warrant is issued
 - unnamed police officers may assist
- it must be performed between 6 a.m. and 9 p.m. standard time, unless the warrant specifies otherwise
- places which could not possibly contain the things to be searched for may not be searched
- the search must end when the things described in the warrant have been found
- a search warrant may be executed only once

■ Inspection of the warrant

- the person inspected is not entitled to a copy of the warrant prior to the search, but may be provided one as a courtesy
- after execution of the warrant is completed, the person inspected is entitled to a copy of the warrant and of the supporting information. These may be obtained from the court or from the MOE

A.G. of Nova Scotia et al. v. MacIntyre (1982), 65 C.C.C. (2d) 129 (S.C.C.)

Re Chapman and the Queen (1984), 46 O.R. (2d) 65 (Ont. C.A.)

- in exceptional cases, the Crown may apply to the court for an order protecting from disclosure until trial some portions of the supporting information (e.g. the name of a confidential informant)

■ The return

- all things seized under the warrant or during the search must be carried before a justice (the 'return') within a reasonable period, usually one to two weeks

Provincial Offences Act s. 143

- the return may be made without notice to the person from whom the evidence was seized

R. v. Church of Scientology of Toronto, Ont. C.A.,
January 30, 1987, unreported

■ Detention of things seized

- the justice shall order the detention of the things for a period of up to 3 months

R. v. Church of Scientology of Toronto, Ont. C.A.,
January 30, 1987, unreported

- the detention period may be extended by laying charges to which the things relate, or by orders for extended detention. Such orders may be made for any reasonable period of time, upon an application without notice. The application should be made before the prior detention order expires

Provincial Offences Act s. 143(2)

R. v. Church of Scientology of Toronto, Ont. C.A.,
January 30, 1987, unreported

■ Examination and release

- any person with an interest in the thing may apply to a justice for an order releasing the thing where its detention is no longer necessary

Provincial Offences Act s. 143(4)

- an order may also be sought to examine or test the thing

Provincial Offences Act s. 143(3)

■ Solicitor – client privilege may be claimed, where appropriate, in anything seized

Provincial Offences Act s. 144

■ The proper forum to challenge a search warrant is by way of application for certiorari before trial

R. v. Komadowski, (1986) 3 W.W.R. 657 (Man. C.A.)

WARRANTLESS SEARCHES

- Must always be based upon reasonable and probable grounds
- Must always be performed reasonably
- If it is feasible to obtain a warrant, a warrant should be obtained

- Warrantless searches are permissible where it is not feasible to obtain a warrant ('exigent circumstances'), e.g.
 - where reasonable grounds exist to search vehicle or vessel which is moving or likely to be moved
 - R. v. Meredith*, (unreported Endorsement) Ont. C.A. June 17, 1985
 - R. v. Debott* (1987), 30 C.C.C. (3d) 209 (Ont. C.A.)
 - to deal with an immediate hazard to the environment or to human beings
 - Bertram Miller v. R.*, 28 C.C.C. (3d) 263 (Fed. C.A.)
 - c.f. *Michigan v. Tyler*, 436 U.S. 499 (1978)
 - where evidence of an environmental incident, such as a spill or emission, is transient, allowing no time to obtain a warrant before the disappearance of the evidence
 - c.f. *R. v. Noble* (1984), 16 C.C.C. (3d) 146 (Ont. C.A.)

- If resistance or a need to use force is anticipated, the assistance of a police officer will generally be sought. Provincial officers cannot lawfully execute a search by force.

WARRANTLESS SEIZURES

- During a proper warrantless search, the officer may seize anything which he/she finds which could have been seized under a warrant, i.e., anything upon or in respect of which an offence has been or is suspected to have been committed; or that there is reasonable ground to believe will afford evidence of the commission of an offence
- An officer acting lawfully in the course of his/her duties who *unexpectedly* comes upon evidence of an offence which is in plain view may seize it without a warrant
- Abandoned property, such as garbage put out for municipal pickup, dumped waste or effluent outfalls, may be seized without a warrant, where the seizure does not require an unauthorized search of private property
- Vehicle permits and plates of a vehicle which is found committing an offence relating to hauled liquid industrial waste or hazardous waste may be seized without a warrant
 - s. 47a *Environmental Protection Act*
 - c.f. *Milton v. Canada*, (1987) 2 W.W.R. 662 (B.C.C.A.)
- If anything has been seized without warrant as evidence of

a contravention of the Act or regulations for the purpose of prosecution, it should be carried before a justice for a detention hearing upon notice to the person for whom it was seized

R. v. Church of Scientology of Toronto, Ont. C.A.,
January 30, 1987, unreported

PROTECTION OF CONFIDENTIAL INFORMATION DURING AN INSPECTION OR SEARCH

- Statutory protection
Environmental Protection Act s. 130
- Government policy on freedom of information and protection of privacy
- Confidential info should be specifically identified, and protection requested

CONSEQUENCES OF FAILING TO CO-OPERATE WITH A PROVINCIAL OFFICER ACTING IN THE COURSE OF DUTY

- Damage to environment
- Possible loss of subsequent due diligence defence
- Revocation of licenses, etc.
- Obstruction charges
Environmental Protection Act, s. 129,
Pesticides Act, s. 17 (5)
- Personal liability of directors and officers
Environmental Protection Act, s. 147a

REMEDIES FOR UNREASONABLE SEARCH AND SEIZURE

- Complaint to the Minister, Deputy Minister, or Director
- Application to a justice for return of anything seized, or release of anything detained
- Application to the Supreme Court to quash the search warrant
Provincial Offences Act, s. 124
- Application at trial for the exclusion of evidence in any subsequent prosecution
Canadian Charter of Rights and Freedoms, s. 8, 24(2)

- N.B. Provincial officers and other Ministry employees cannot be personally sued for damages for any act done in good faith in the execution or intended execution of any statutory duty or authority or for any alleged neglect or default in the execution in good faith of such duties

Environmental Protection Act, s. 140

Ontario Water Resources Act, s. 53

Pesticides Act, s. 16

APPENDIX I

EXCERPTS FROM THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Being Part I of the Constitution Act, 1982
Amended by the Constitution Amendment Proclamation, 1983,
effective June 21, 1984

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

RIGHTS AND FREEDOMS IN CANADA.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

NOTE: If a breach of another Charter section can be shown by a defendant, the onus shifts to the Crown to *prove* that its action is

- a) "prescribed by law", i.e. clearly established by a legal statute, regulation or other legal document, and not at the whim of an officer;
- b) "demonstrably justifiable in a free and democratic society", i.e.
 - i) for the sake of truly important public objectives.
 - ii) necessary and useful to achieve those objectives, and
 - iii) not wider than necessary to achieve those objectives

Fundamental Freedoms

FUNDAMENTAL FREEDOMS.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Legal Rights

LIFE, LIBERTY AND SECURITY OF PERSON.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

NOTE: The scope of this section is still very unclear.

'Everyone' includes corporations

"Life, liberty and security of the person" are terms which refer primarily to human individuals, not to corporations. (some courts disagree)

Aluminum Co.

Property rights are not included

'principles of fundamental justice' include the substance (policy) of legislation, not merely fair procedure.

B.C. Motor Vehicle Reference

e.g. An offence which can be punished by imprisonment or probation cannot be an offence of absolute liability, the defendant must always have a defence of due diligence.

B.C. Motor Vehicle Reference

SEARCH OR SEIZURE.

8. Everyone has the right to be secure against unreasonable search or seizure.

NOTE: 'Everyone' includes corporations

Every search or seizure is presumed to be unreasonable unless it was performed

- with consent, or
- under the authority of a warrant, issued by a justice or judge, on reasonable grounds,

Warrantless searches or seizures are exceptions, allowed only where it was not feasible to obtain a warrant.

e.g. *Hunter v Southam Texaco #1*

So far, most routine administrative inspections and demands for the production of documents have not been considered to be 'unreasonable searches or seizures'.

DETENTION OR IMPRISONMENT.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

NOTE: 'Arbitrary' means except on reasonable (or at least 'articulable') grounds

'Detention' includes every time a person's freedom of movement is impeded by a demand or direction from a person in authority

Therens

e.g. waving down drivers for random checks of their licences and insurance

Ladouceur

ARREST OR DETENTION.

10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right; and
 - (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

NOTE: Officers cannot ask any questions or seize any evidence before advising a detained person of their right to counsel. The officer must also take positive steps to help the detained person contact a lawyer, e.g. by providing a telephone, a phone book, and privacy.

PROCEEDINGS IN CRIMINAL AND PENAL MATTERS

11. Any person charged with an offence has the right
 - (a) to be informed without unreasonable delay of the specific offence;

NOTE: Applies only to prosecutions; does not apply to protective/regulatory procedures such as control order, stop orders, etc.

Trumbley & Pugh v Fleming

Malartic

Kay Cee Kay Restaurants

- b) Right to trial within a reasonable time: applies only to delay after a charge is laid
 - key factors to be considered:
 - has the defendant's ability to defend itself been impaired by the passage of time;
 - did the defendant cause or consent to any delays;
 - was the case so complex as to require extra time to prepare
 - what resources were available to the Crown to avoid the delay (this is not always accepted to excuse a delay)
Mills

- d) Right to be presumed innocent

Reverse onus clauses which require a defendant to prove his innocence are unconstitutional

Oakes

However, it remains possible to create an offence of strict liability, especially in the regulatory area

Lees Poultry

- h) Rule against Double Jeopardy

A person who has been finally convicted or acquitted of an offence may not be again charged with the same offence

arising out of the same facts.

D'Attore

However an administrative order does not bar a prosecution and vice versa

Eagle Disposal

Pelissero

Also, multiple convictions may be entered arising out of the same facts, if each charge includes different factual elements, or harm to a different victim

Krug

Prince

- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

TREATMENT OR PUNISHMENT

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

SELF-CRIMINATION.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

NOTE: Evidence given by anyone in any court or similar proceeding cannot be used later in a proceeding against that person, either

- a) by reading it into evidence, or

b) by cross-examining him/her on it,
even in a second trial on the same charge.

Mannion

INTERPRETER.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceeding are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

EQUALITY BEFORE AND UNDER LAW AND EQUAL PROTECTION AND BENEFIT OF LAW — Affirmative action programs.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

NOTE: By s. 32(2) of the Constitution Act, 1982, the above section came into force April 17, 1985.

NOTE: Every individual has the right to be treated the same as every other individual in similar circumstances. This is *not* limited to preventing discrimination on the traditional grounds of race, creed, colour, etc.

e.g. it may be argued that one waste hauler may not be prosecuted for using an unlicensed waste disposal site if others using the same or similar sites are not prosecuted.

Enforcement

ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS — Exclusion of evidence bringing administration of justice into disrepute.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

NOTE: (2) Any evidence obtaining following (not necessarily *because* of) a Charter breach will be excluded, if the trial judge thinks its admission 'could bring the administration of justice into disrepute'.

key considerations:
good faith of the officers
severity of the breach

General

ABORIGINAL RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

25. (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
25. (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. SI/84-102, Sch.

OTHER RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

MULTICULTURAL HERITAGE.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

RIGHTS GUARANTEED EQUALLY TO BOTH SEXES.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

LEGISLATIVE POWERS NOT EXTENDED.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

APPLICATION OF CHARTER — Exception.

32. (1) This Chapter applies
 - (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- (2) Notwithstanding subsection (1), section 15 shall not have

effect until three years after this section comes into force.

EXCEPTION WHERE EXPRESS DECLARATION — Operation of exception — Five year limitation — Re-enactment — Five year limitation.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

PART VII

General

PRIMACY OF CONSTITUTION OF CANADA — Constitution of Canada — Amendments to Constitution of Canada.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Environmental Protection Act

CHAPTER 141

83.—(1) For the purpose of carrying out any duty imposed or order or direction made or given under this Part, any person subject to the duty or to whom the order or direction is made or given and his employees and agents, may enter and have access through or over any building, structure, vehicle, land, water or air and may construct structures and use machinery, structures, materials, and equipment therein or thereon and may remove therefrom the pollutant or any matter, thing, plant or animal or any part of the natural environment that is affected or that may reasonably be expected to be affected by the pollutant.

Entry and removal

(2) The rights set out in subsection (1) may be enforced by application without notice to a judge of the Supreme Court or a local judge of the High Court by a person, employee or agent referred to in subsection (1).

Enforcement of right of entry, etc.

(3) Where the judge or local judge is satisfied, on an application under subsection (2), that there is reasonable ground for believing that it is necessary,

Order by judge

- (a) to enter and have access through or over any building, structure, vehicle, land, water or air;
- (b) to construct structures or use machinery, structures, materials or equipment therein or thereon; or
- (c) to remove the pollutant or any matter, thing, plant or animal or any part of the natural environment that is affected or that may reasonably be expected to be affected by the pollutant,

for the purpose of carrying out any duty imposed or order to direction made or given under this Part, the judge or local judge may issue an order authorizing the person and his employees and agents or any one or more of them to act as mentioned in clauses (a), (b) and (c), or any of them, but every such action shall be taken between sunrise and sunset unless the judge or local judge authorizes them or any of them to act at another time. R.S.O. 1980, c. 141, s. 83.

84.—(1) No person, employee or agent exercising any authority under subsection 88 (1) or carrying out any duty imposed or order or direction made or given under this Part shall dispose of or use any pollutant, or any matter, thing, plant or animal or any part of the natural environment that is affected or that may reasonably be expected to be affected by the pollutant except,

Disposal of
pollutant,
etc.

- (a) in accordance with an order of or direction by the Minister under this or any other Act;
- (b) in accordance with a direction by or the approval of the Director, but such a direction or approval shall not be contrary to the regulations, or
- (c) in accordance with an approval, order, requirement or direction by the Director under any other Part of this Act or by a Director under any other Act administered by the Minister, but such an approval, order, requirement or direction shall not be contrary to the regulations.

(2) The Director may give to any person, employee or agent mentioned in subsection (1), and may amend or revoke, a direction or approval mentioned in clause (1) (b) and may do so notwithstanding the terms of or conditions in a certificate of approval issued under Part V in respect of a waste disposal site.

Direction or
approval by
Director

(3) The Director may attach such conditions as he considers necessary to an approval mentioned in clause (1) (b). Conditions

(4) The Director need not hold or afford to any person an opportunity for a hearing before giving, amending or revoking a direction or approval referred to in clause (1) (b). R.S.O. 1980, c. 141, s. 84. Hearing

Provincial Officers

PART XII

126.—(1) A provincial officer may survey from time to time anything that he has reason to believe is or may be a source of contaminant, and after completing such survey shall report his findings and his recommendations. R.S.O. 1980, c. 141, s. 126 (1). Survey by provincial officer

(2) REPEALED: 1986, c. 68, s. 9.

127.—(1) For the purpose of the administration of this Act and the regulations, a provincial officer may, from time to time and upon production of his designation, enter at any reasonable time any building, structure, machine, vehicle, land, water or air and make or require to be made such surveys, examinations, investigations, tests and inquiries, including examinations of books, records and documents, as he considers necessary, and may make, take and remove or may require to be made, taken or removed samples, copies or extracts. R.S.O. 1980, c. 141, s. 127 (1). Powers of provincial officer

(1a) A provincial officer may detain any thing at the place where he finds it or may remove the thing or cause it to be removed to another place until the surveys, examinations, investigations, tests and inquiries in respect of the thing that the provincial officer is authorized to make or require to be made are completed. Detention or removal for testing

(1b) Upon application with notice by the owner or the person who had the charge, management or control of a thing detained by a provincial officer, a justice of the peace may make an order for the release of the thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of the administration of this Act and the regulations. Application for release

(1c) An appeal lies from an order or refusal to make an order under subsection (1b) by a justice of the peace in the same manner as an appeal from a conviction in a proceeding commenced by means of a certificate under the *Provincial Offences Act*. 1983, c. 52, s. 20 (1). Appeal R.S.O. 1980, c. 400

(2) Where a justice of the peace is satisfied, upon an *ex parte* application by a provincial officer, that there is reasonable ground for believing that it is necessary to enter any building, structure, machine, vehicle, land, water or air or to detain or remove any thing for the administration of this Act or the regulations, the justice of the peace may issue an order authorizing a provincial officer to enter therein or thereon to detain or to remove any thing and to make or require to be made such surveys, examinations, investigations, tests and inquiries and to take the other actions mentioned in subsection (1) but every such entry, survey, examination, investigation, test, inquiry and other such action shall be made or taken between sunrise and sunset unless the justice of the peace authorizes the provincial officer, by the order, to so act at another time. R.S.O. 1980, c. 141, s. 127 (2); 1983, c. 52, s. 20 (2).

(3) Every person responsible for a source of contaminant shall furnish such information as a provincial officer requires for the purposes of this Act or the regulations. R.S.O. 1980, c. 141, s. 127 (3).

128.—(1) Whenever a provincial officer is required or empowered by this Act or the regulations to do or direct the doing of anything, such provincial officer may take such steps and employ such assistance as is necessary to accomplish what is required, and may, when obstructed in so doing, call for the assistance of any member of the Ontario Provincial Police Force or the police force in the area where the assistance is required and it is the duty of every member of a police force to render such assistance.

(2) A provincial officer, for the purpose of carrying out the provisions of this Act and the regulations, may require the driver of any motor vehicle to stop and may inspect the motor vehicle and require the driver of the motor vehicle to submit the motor vehicle, together with its equipment and any trailer attached thereto, to such examinations and tests at such place or places and time or times as the provincial officer considers expedient and where the provincial officer considers it necessary or expedient he may call for the assistance of any member of the Ontario Provincial Police Force or the police force in the area where the assistance is required and it is the duty of every member of a police force to render such assistance.

(3) Every driver of a motor vehicle shall stop to submit the motor vehicle, together with its equipment and any trailer attached, to such examinations and tests as may be required by a provincial officer or a member of a police force referred to in subsection (2). R.S.O. 1980, c. 141, s. 128.

Order
authorizing

Information

Calling for
assistance of
member of
police force

Inspection of
motor
vehicles

Duty of
driver of
motor vehicle

129. No person shall hinder or obstruct a provincial officer in the lawful performance of his duties or furnish a provincial officer with false information or refuse to furnish him with information required for the purposes of this Act and the regulations. R.S.O. 1980, c. 141, s. 129.

Obstruction
of provincial
officer

130.—(1) Except as to information in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment, every provincial officer shall preserve secrecy in respect of all matters that come to his knowledge in the course of any survey, examination, test or inquiry under this Act or the regulations and shall not communicate any such matters to any person except,

Matters
confidential

- (a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations;
- (b) to his counsel; or
- (c) with the consent of the person to whom the information relates.

(2) Except in a proceeding under this Act or the regulations, no provincial officer shall be required to give testimony, other than testimony in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment, in any civil suit or proceeding with regard to information obtained by him in the course of any survey, examination, test or inquiry under this Act or the regulations. R.S.O. 1980, c. 141, s. 130.

Testimony in
civil suit

Pesticides Act

17.—(1) The Minister may designate in writing one or more officers or employees of the Ministry or other persons as provincial officers for the purposes of this Act and the regulations. Provincial officers

(2) For the purpose of the administration of this Act and the regulations, a provincial officer may, from time to time and upon production of his designation, enter at any reasonable time any building, structure, machine, vehicle, land, water or air and make or require to be made such surveys, examinations, investigations, tests and inquiries, including examinations of books, records and documents, as he considers necessary, and may make, take and remove or may require to be made, taken or removed samples, copies or extracts. Powers of provincial officers

(3) Where a justice of the peace is satisfied, upon an *ex parte* application by a provincial officer, that there is reasonable ground for believing that it is necessary to enter any building, structure, machine, vehicle, land, water or air for the administration of this Act or the regulations, the justice of the peace may issue an order authorizing a provincial officer to enter therein or thereon and to make or require to be made such surveys, examinations, investigations, tests and inquiries and to take the other actions that are mentioned in subsection (2), but every such entry, survey, examination, investigation, test, inquiry and other such action shall be made or taken between sunrise and sunset unless the justice of the peace authorizes the provincial officer, by the order, to so act at another time. Order authorizing entry

(4) Every person responsible for a pesticide or for a substance or thing containing a pesticide that is the subject of an investigation by a provincial officer, and every person who assists such a person, shall furnish such information as the provincial officer requires for the purpose of the investigation. Information

(5) No person who is responsible for a pesticide or for a substance or thing containing a pesticide or who assists such a person shall hinder or obstruct a provincial officer in the lawful performance of his duties or furnish a provincial officer with false information. R.S.O. 1980, c. 376, s. 17. Obstruction of provincial officer

Ontario Water Resources Act

Section 10

10.—(1) The Minister and his employees and agents may at any time for his purposes, without consent and without compensation, enter the land or buildings of the Province or of any municipality or of any person, or into any highway or road under the jurisdiction and control of any public authority, or into any boat or ship to which the regulations under clause 44 (1) (k) apply, and may make such surveys, examinations, investigations, inspections or other arrangements as he considers necessary. Inspection of premises, etc.

(2) The Minister and his employees and agents may for his purposes, without consent and without compensation, lay, maintain, repair, alter or replace such pipes and appurtenances thereto as he considers necessary in, upon, through, over and under any highway or road under the jurisdiction and control of any public authority. Right to lay and maintain pipes under roads

(3) Lands, buildings, highways or roads disturbed by the exercise of any of the powers mentioned in subsection (1) or (2) shall be restored to their original condition without unnecessary delay. R.S.O. 1980, c. 361, s. 10 (1-3). Lands, etc. to be restored

(4) Every person who hinders or obstructs any employee or agent of the Minister in the exercise of his powers or the performance of his duties under subsection (1) is guilty of an offence. R.S.O. 1980, c. 361, s. 10 (4); 1986, c. 68, s. 22. Offence

Provincial Offences Act

Search Warrants

Section 142

142.—(1) Where a justice is satisfied by information upon oath that there is reasonable ground to believe that there is in any building, receptacle or place,

Search warrants

- (a) anything upon or in respect of which an offence has been or is suspected to have been committed; or
- (b) anything that there is reasonable ground to believe will afford evidence as to the commission of an offence,

he may at any time issue a warrant in the prescribed form under his hand authorizing a police officer or person named therein to search such building, receptacle or place for any such thing, and to seize and carry it before the justice issuing the warrant or another justice in the county or district in which the provincial offences court having jurisdiction in respect of the offence is situated to be dealt with by him according to law.

(2) Every search warrant shall name a date upon which it expires, which date shall be not later than fifteen days after its issue.

(3) Every search warrant shall be executed between 6 a.m. and 9 p.m. standard time, unless the justice by the warrant otherwise authorizes. R.S.O. 1980, c. 400, s. 142.

When to be executed

143.—(1) Where any thing is seized and brought before a justice, he shall by order,

Detention of things seized

- (a) detain it or direct it to be detained in the care of a person named in the order; or
- (b) direct it to be returned.

and the justice may in the order authorize the examination, testing, inspection or reproduction of the thing seized upon such conditions as are reasonably necessary and directed in the order, and may make any other provision as in the opinion of the justice is necessary for its preservation.

(2) Nothing shall be detained under an order made under subsection (1) for a period of more than three months after the time of seizure unless, before the expiration of that period,

Time limit for detention

- (a) upon application, a justice is satisfied that having regard to the nature of the investigation, its further detention for a specified period is warranted and he so orders; or

(b) proceedings are instituted in which the thing detained may be required.

(3) Upon the application of the defendant, prosecutor person having an interest in a thing detained under subsection (1), a justice may make an order for the examination, testing, inspection or reproduction of any thing detained upon such conditions as are reasonably necessary and directed in the order.

(4) Upon the application of a person having an interest in a thing detained under subsection (1), and upon notice to the defendant, the person from whom the thing was seized, the person to whom the search warrant was issued and any other justice may make an order for the release of any thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of an investigation or proceeding.

(5) Where an order or refusal to make an order under subsection (3) or (4) is made by a justice of the peace, an appeal lies therefrom in the same manner as an appeal from a conviction in a proceeding commenced by means of a certificate. R.S.O. 1980, c. 400, s. 143.

144.—(1) Where under a search warrant a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of a named client in respect of the document, the person shall, without examining or making copies of the document,

(a) seize the document and place it, together with any other document seized in respect of which the same claim is made on behalf of the same client, in a package and seal and identify the package, and

(b) place the package in the custody of the clerk of the court in the jurisdiction of which the seizure was made or, with the consent of the person and the client, in the custody of another person.

(2) No person shall examine or seize a document that is in the possession of a lawyer without giving him a reasonable opportunity to claim the privilege under subsection (1).

(3) A judge may, upon the *ex parte* application of the lawyer, by order authorize the lawyer to examine or make a copy of the document in the presence of its custodian or the judge, and the order shall contain such provisions as are necessary to ensure that the document is repackaged and resealed without alteration or damage.

Application for examination and copying

Application for release

Appeal where order by justice of the peace

Examination or seizure of documents where privilege claimed

Opportunity to claim privilege

Examination of documents in custody

(4) Where a document has been seized and placed in custody under subsection (1), the client by or on whose behalf the claim of solicitor-client privilege is made may apply to a judge for an order sustaining the privilege and for the return of the document. Application to determine privilege

(5) An application under subsection (4) shall be by notice of motion returnable not later than thirty days after the date on which the document was placed in custody. Limitation

(6) The person who seized the document and the Attorney General are parties to an application under subsection (4) and entitled to at least three days notice thereof. Attorney General a party

(7) An application under subsection (4) shall be heard in private and, for the purposes of the hearing, the judge may examine the document and, if he does so, shall cause it to be resealed. Private hearing and scrutiny by judge

(8) The judge may by order, Order

- (a) declare that the solicitor-client privilege exists or does not exist in respect of the document;
- (b) direct that the document be delivered up to the appropriate person.

(9) Where it appears to a judge upon the application of the Attorney General or person who seized the document that no application has been made under subsection (4) within the time limit prescribed by subsection (5), the judge shall order that the document be delivered to the applicant. R.S.O. 1980, c. 400, s. 144. Release of document where no application under subs. (4)

Orders on Application Under Statutes

PART VIII

145. Where, by any other Act, proceedings are authorized to be taken before a court or a justice for an order, including an order for the payment of money, this Act applies with necessary modifications to the proceeding in the same manner as to a proceeding commenced under Part III, and for the purpose, Orders under statutes

- (a) in place of an information, the applicant shall complete a statement in the prescribed form under oath attesting, on reasonable and probable grounds, to the existence of facts that would justify the order sought; and
- (b) in place of a plea, the defendant shall be asked whether or not he wishes to dispute the making of the order. R.S.O. 1980, c. 400, s. 145.

Fisheries Act

Powers of Fishery Officers

35. (1) Subject to subsection (2), a fishery officer or fishery guardian may enter any place, premises, vessel or vehicle in which he believes on reasonable grounds there is any fish, fishing equipment or any books, records or other documents relating to the administration of this Act or the regulations in order to carry out such inspections as he deems necessary to ensure compliance with the Act and the regulations.

(2) Where any place, premises, vessel or vehicle referred to in subsection (1) is a dwelling-house, a fishery officer or fishery guardian may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant issued under subsection (3).

(3) Where on *ex parte* application a justice of the peace is satisfied by information on oath.

(a) that the conditions for entry described in subsection (1) exist in relation to a dwelling-house.

(b) that entry to the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(c) that entry to the dwelling-house has been refused or that there are reasonable grounds for believing that entry thereto will be refused.

he may issue a warrant under his hand authorizing the fishery officer or fishery guardian named therein to enter that dwelling-house subject to such conditions as may be specified in the warrant.

(4) In executing a warrant issued under subsection (3), a fishery guardian shall not use force unless

(a) he is a peace officer or is accompanied by a peace officer; and

(b) the use of force has been specifically authorized in the warrant.

35.1 (1) A fishery officer with a warrant issued under subsection (2) may search any building, vehicle, vessel or place where he believes on reasonable grounds that any fish taken in contravention of this Act or the regulations, or anything used in contravention thereof, is concealed.

(2) Where on *ex parte* application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that there is in any building, vehicle, vessel or place referred to in subsection (1).

(a) anything on or in respect of which any contravention under this Act has been or is suspected to have been committed, *or*

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of any contravention under this Act.

(3) Notwithstanding subsection (1), a fishery officer may exercise the power of search referred to in that subsection without a warrant issued under subsection (2) if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

(4) For the purposes of subsection (3), exigent circumstances include circumstances in which the delay necessary to obtain the warrant would result in danger to human life or safety or the loss or destruction of evidence.

Pest Controls Products Act

7. (1) An inspector may at any reasonable time
(a) enter any place or premises for the purpose of carrying into effect any of the provisions of this Act or in which he reasonably believes a control product to which this Act applies is or has been manufactured, stored, sold or used or in which he reasonably believes there is any control product to which this Act applies or any material that is contaminated by a control product or that is used or capable of being used in this manufacture of a control product;
(b) examine any such control product or material found therein in bulk or open any package found therein that he has reason to believe contains any such control product or material and take samples thereof; and
(c) require any person to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom, any books, shipping bills, bills of lading, documents containing instructions, or other documents or papers concerning any matter relevant to the administration of this Act or the regulations.

(2) An inspector shall be furnished with a certificate of his designation as an inspector and on entering any place or premises referred to in subsection (1) shall, if so required, produce the certificate to the person in charge thereof.

(3) The owner or person in charge of any place or premises referred to in subsection (1) and every person found therein shall give an inspector all reasonable assistance in his power to enable the inspector to carry out his duties and functions under this Act and the regulations and shall furnish him with such information with respect to the administration of this Act and the regulations as he may reasonably require. 1968-69, c. 50, s. 7.

8. (1) No person shall obstruct or hinder an inspector in the carrying out of his duties or functions under this Act or the regulations.

(2) No person shall make a false or misleading statement either verbally or in writing to an inspector or other officer engaged in carrying out his duties or functions under this Act or the regulations.

(3) Except as provided by this Act no person shall remove from detention any control product seized and detained pursuant to this Act. 1968-69, c. 50, s. 8.

Powers of
inspector

Certificate of
appointment

Assistance to
inspector

Obstruction of
inspector

False
statements

Breaking of
detention

9. (1) Whenever an inspector believes on reasonable grounds that this Act or the regulations have been violated he may seize and detain the control product by means of or in relation to which he reasonably believes the violation was committed. Seizure

(2) Any control product seized and detained pursuant to sub-section (1) shall not be detained after Detention

(a) in the opinion of an inspector the provisions of this Act and the regulations have been complied with,

(b) the owner agrees to dispose of such control product in a manner satisfactory to the Minister, or

(c) the expiration of six months from the day of seizure, or such longer period as may be prescribed with respect to any control product,

unless before that time proceedings have been instituted in respect of the violation in which event the control product may be detained until the proceedings are finally concluded.

(3) Where a person has been convicted of a violation of this Act, every control product by means of or in relation to which the offence was committed is, upon the conviction, in addition to any penalty imposed, forfeited to Her Majesty if such forfeiture is directed by the court. Forfeiture

(4) Where an inspector has seized a control product and the owner thereof or the person in whose possession the control product was at the time of seizure consents in writing to the disposal thereof, the control product is thereupon forfeited to Her Majesty and shall be disposed of, at the expense of the person consenting to the disposal, as the Minister may direct. Disposal with consent

(5) The Governor in Council may make regulations Regulations

(a) respecting the detention of any control product seized under this section, the establishment of procedures for the review of any seizure and detention and the payment of any reasonable costs incidental to such seizure or detention, and for preserving or safeguarding any control product so detained; and

(b) respecting the destruction or disposition of any control product forfeited under this section and the payment of any reasonable costs identical to such destruction or disposition. 1968-69, c. 50, s. 9.

INTERIM POLICY ON PUBLIC ACCESS TO REPORTS FROM EXTERNAL PARTIES

Legislative Authority

**the Environmental Protection Act
the Ontario Water Resources Act
the Environmental Assessment Act
the Pesticides Act**

Statement of Principles

This policy provides for public access to reports, as defined, that the Ministry of the Environment receives pursuant to its environmental legislation.

The intent of the policy is to ensure access to externally provided reports in accord with the principles of freedom of information and protection of individual privacy, while at the same time respecting public access, confidentiality and privacy requirements of the Ministry's legislation.

The policy will apply until such time as Freedom of Information and Protection of Individual Privacy legislation is enacted.

Definitions

External Parties

External parties are considered to be any organization, company, agency or individual submitting a report pursuant to the Ministry's role in the management of emissions to the natural environment.

Report

A report is any document submitted directly to the Ministry by an external party which quantifies any contaminant or material deposited or emitted, or proposed to be deposited or emitted to the natural environment, or which describes measures to contain or control such contaminant or material.

Major Interest Reports

Major interest reports are those which detail significant public health or environmental issues.

1. Policy Statement

The Ministry of the Environment will provide the public with access to reports submitted directly to the Ministry by external parties. Directors in

receipt of reports are expected to exercise judgement and discretion in applying this policy.

2. External Report Preparations

External reports, other than prescribed forms, should be prepared to facilitate public access and the protection of confidentiality and personal privacy as follows:

■ Report Format

Ministry staff should request external parties submitting reports to prepare them in such a format that any information for which they may make a claim of confidentiality or privacy not be included in the body of the report but be provided as a separate appendix.

■ Certification of Confidentiality Claim

Parties making confidentiality or privacy claims shall be expected to specify in writing as part of the document:

- a) what information is to be kept confidential or private;
- b) the rationale for the claim;
- c) what legislation authorizes the claim; and
- d) what consequences would likely follow from access to the information.

3. Examination of Confidentiality Claims

- (a) The Director in receipt of an external report including a confidentiality or privacy claim is encouraged to consult with the Director of Legal Services Branch where, in his/her discretion, such consultation would be beneficial and shall consult with the Director of Legal Services Branch where the factors relating to the claim are complex or unclear.
- (b) If the claim is accepted either initially by the Director in receipt of the report or after the consultation referred to in (a) then no further action regarding the claim is necessary;
- (c) If the claim is rejected then the Director in receipt of the report is authorized to:
 - provide for public access to the portion of the report not in dispute;
 - advise the external party of the Director's intention to provide public access to any portion of the appendix for which a privilege claim has been denied unless within 30 days further valid argument can be made in support of the privilege claim;
- (d) If there is a difference of opinion between the Director in receipt of the report and the Director of Legal Services, then the Division Head is to be apprised of the issue to be resolved.

4. Ensuring of Public Access

■ Routine Reports

The Director will ensure public access to all routine reports, except to those portions of which the external party makes a valid claim pursuant to 3 above.

The document or copies of same will be available for public inspection at the relevant District or Branch Office.

■ Major Interest Reports

The Director will determine whether a report is of major interest.

Where a report is considered by the Director to be of major interest a Ministry notification will be prepared by the Communications Branch including:

- a) an announcement that the report has been received by the Ministry;
- b) an announcement describing where and when the report can be examined by the public; and
- c) future Ministry action regarding the report where appropriate.

The Communications Branch will plan appropriate communications activities and be responsible for the release of the MOE notification regarding external reports of major interest.

**TD
194.7
.157
1987**

Inspections and searches in the
environmental context.
82850

